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No. 86-897

In The
# Supreme Court of the United States
October Term, 1986

OTIS B. BOWEN, as Secretary of Health and Human Services,

*Petitioner,*

vs.

JOHN WILSON and MARY I. CHRISTOPHER, individually and on behalf of all others similarly situated,

*Respondents.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

## RESPONDENTS' BRIEF IN OPPOSITION

## INTRODUCTION

Petitioner, the Secretary of Health and Human Services, requests that his petition for Writ of Certiorari be granted pending the Court's decision in *Bowen v. Yuckert, cert. granted,* 54 U.S.L.W. 3573 (May 20, 1986) (No. 85-

1409). (Pet. at 15). This request should be denied because the issue on which the Secretary sought and obtained review in *Yuckert* has no bearing on the validity of the preliminary injunction in this case.

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## SUMMARY OF ARGUMENT

In *Yuckert,* the Secretary represented to this Court that thre was no need for a factual record regarding the issues in that case because *Yuckert* raised solely the facial validity of the severity regulation. (*Yuckert* Reply Br. at 1). Because this case challenges the Secretary's practices in applying the severity regulation, resolution of the issue the Secretary presents in *Yuckert* will not dispose of the issues presented here. Every Court of Appeals that has considered the question has recognized that the legality of a severity rule that operates as more than a de minimis screening device is a separate question from the validity of a de minimis rule permitting screening of claims without full vocational evaluations. These courts have all held that the Secretary cannot deny benefits on medical grounds alone, with a rule that is not de minimis. In this case, the District Court made a preliminary finding that, in practice, the Secretary applies the severity regulation as more than a de minimis threshold, and this finding was affirmed on appeal. Accordingly the judgment below will stand regardless of the Court's disposition of *Yuckert.*

Furthermore, the preliminary stage of the proceedings in this case strongly counsels against reviewing or

vacating the injunction issued below. At this stage, the parties have not yet completed discovery and the District Court has neither made final factual findings, not crafted the terms of a final injunction. As this case proceeds to trial on the merits, the Secretary will have ample opportunity to introduce any relevant evidence and to propose any appropriate form of injunction. The Secretary has made no showing that he would be prejudiced by awaiting such resolution in the District Court. Accordingly, certiorari should be denied at this stage in this litigation and the preliminary injunction should not be disturbed.

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## REASONS WHY THE PETITION SHOULD BE DENIED

### A. Resolution Of Yuckert In The Secretary's Favor Would Not Dispose Of The Issues Presented Here.

The Secretary's argument that the petition here should be held and disposed of in light of the Court's Opinion in *Yuckert* rests on the conclusory assertion that "[i]f the Court sustains the severity regulation in *Yuckert,* the preliminary injunction in this case must be rereversed on the merits . . . " (Pet. at 15) This assertion is disingenuous in light of the Secretary's own statements to this Court in *Yuckert.* In response to Yuckert's argument that the absence of an adequate factual record in that case made review inappropriate, the Secretary assured the Court that "[t]his case presents a single and straightforward question of law:

> [w]hether the 'severity' regulation promulgated by the Secretary of Health and Human Services . . . is invalid on its face. (*Yuckert* Reply Br. at 1).

The Secretary cannot have it both ways. Having sought review in *Yuckert* by claiming that the case only presented the issue of the severity regulation's facial validity, he cannot now claim that a decision in that case will dispose of a fact-based challenge to the application of his severity regulation.

Resolution of the instant case depends upon just such factual questions concerning the regulation's application. It is true that the District Court below held that plaintiffs had established a likelihood of demonstrating the facial invalidity of the severity regulation in light of *Baeder v. Heckler,* 768 F. 2d 547 (3d Cir. 1985). *Baeder* and the District Court below each assumed that were the Secretary to apply the severity regulation in a true de minimis fashion, it might implicitly consider vocational factors and be consistent with the Statute. *See Baeder,* 768 F. 2d at 552. However, "Because the [*Baeder*] court expressly found that the Secretary was not applying the severity regulation as a de minimis requirement, it did not hesitate to invalidate the regulation." *Wilson v. Heckler,* 622 F. Supp. 649, 652 (D.N.J. 1985) *aff'd as modified,* 796 F. 2d 36 (3d Cir. 1986).

The Third Circuit in *Baeder* summarized the reasons for holding the severity regulation invalid as it was applied:

> When she denies benefits to persons with medical problems of the degree experienced by Baeder, without any evaluation of his vocational characteristics, as well as 40 percent of all other applicants, we will not hear the Secretary define a 'non-severe' impairment as one which may never justify a finding that the person cannot work. *Baeder,* 768 F. 2d at 553.

The court cited statistical evidence showing an increase in denials on the basis of medical factors alone from 8.4 percent in 1975 to 40.3 percent in 1982. *Id.* at 552. (citation omitted)

In affirming the preliminary injunction of the District Court below, the Third Circuit again acknowledged that a narrow interpretation of the severity regulation "read to apply only to applicants whose impairments could never prevent them from working", may be found to contain implicit consideration of vocational factors as required by the Social Security Act. *Wilson,* 796 F. 2d 36, 41 (3d Cir. 1986), citing *Baeder,* 768 F. 2d at 552. The Third Circuit considered the newly issued SSR 85-28 and affirmed the District Court's refusal to allow the continued application of the severity regulation:

> . . . [i]n light of the history of the severity regulations and statistical evidence of their application, the *Baeder* Court decided against permitting such a tenuous accommodation of the Act's mandate. Thus, the District Court correctly concluded that *Baeder* did not present the Secretary with an opportunity to develop a de minimis standard, as SSR 85-28 attempts to do.

*Wilson,* 796 F. 2d at 41-42 (footnote and citation omitted).

Thus, even if the Secretary fully achieves the result he seeks in *Yuckert*—this Court's agreement that he may apply his severity regulation to "screen out" those claimants whose impairments are so minimal that they "would not be found disabled at subsequent steps of the sequential evaluation process in any event" (*Yuckert* Pet. at 23-24)—the preliminary injunction below would stand on the finding of the District Court and Third Circuit that

the Secretary has, in fact, applied the severity step as an independent and unauthorized eligibility restriction.

**B. Regardless Of The Outcome In Yuckert, There Is No Basis For Disturbing The Court Of Appeals' Ruling Upholding The Preliminary Injunction Entered By The District Court.**

The Preliminary Injunction entered by the District Court rests in part on the finding that the Secretary has applied the severity regulation as an independent eligibility restriction rather than as a device to screen meritless claims. The District Court proceeded to find that plaintiffs were likely to succeed in their challenge to the Secretary's restrictive severity practices and that plaintiffs were suffering irreparable harm from these practices. Applying the appropriate standard of review, the Court of Appeals upheld the preliminary injunction as a proper exercise of judicial discretion. As there is no real dispute as to the legal conclusions and factual findings that support the preliminary injunction, there is no basis for either granting plenary review or summarily vacating and remanding the injunction in light of this Court's decision in *Yuckert*.

1. The issue whether the Social Security Act permits a severity test that is more than a de minimis screening device is clearly not worthy of Supreme Court review. All ten Circuit Courts of Appeals that have addressed the "severity" issue have held that the Social Security Act precludes a medical threshold test that permits summary

denial of claims involving more than a de minimis or slight impairment.[1]

Although these courts differ as to whether the proper remedy is to impose a narrow construction on the severity regulations or enjoin its use in its current form altogether, all have condemned the Secretary's imposition of a substantive medical threshold that bars claims of individuals who would otherwise be adjudged disabled.

2. The factual question whether the Secretary has applied more than a de minimis threshold is not properly subject to review, given the preliminary stage of the proceedings below and the deferential standard for reviewing factual findings by lower courts. Moreover, the Secretary himself, has characterized the severity regulations as more than a de minimis threshold test in several court proceedings. *See e.g. Stone v. Heckler*, 752 F. 2d at 1103; *Salmi v. Secretary of Health and Human Services*, 774 F. 2d at 690; *Garza v. Heckler*, 771 F. 2d 871 (5th Cir. 1985).

3. The District Court acted well within its authority in ruling on the form of the injunction. Judge Brotman had before him substantial uncontroverted evidence

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1. *MacDonald v. Secretary of Health and Human Services*, 795 F. 2d 1118 (1st Cir. 1986); *Wilson v. Secretary of Health and Human Services*, 796 F. 2d 36 (3d Cir. 1986); *Evans v. Heckler*, 734 F. 2d 1012 (4th Cir. 1984); *Stone v. Heckler*, 752 F. 2d 1099 (5th Cir. 1985); *Salmi v. Secretary of Health and Human Services*, 774 F. 2d 685 (6th Cir. 1985); *Johnson v. Heckler*, 769 F. 2d 1202 (7th Cir. 1985), *petition for cert. pending*, No. 85-1442; *Brown v. Heckler*, 786 F. 2d 1870 (8th Cir. 1986); *Yuckert v. Heckler*, 774 F. 2d 1365 (9th Cir. 1985), *cert. granted sub nom, Bowen v. Yuckert*, No. 85-1409; *Hansen v. Heckler*, 783 F. 2d 170 (10th Cir. 1986); *Brady v. Heckler*, 724 F. 2d 914 (11th Cir. 1984).

that the Secretary interpreted and applied the severity regulation as a harsh substantive standard that denied benefits to claimants who were, in fact, disabled. *See Wilson*, 622 F. Supp. at 625. (February 1, 1985 Opinion and Order allowing plaintiffs to incorporate new documentary materials into the record).[2] The injunction properly enjoins continued denial of disability claims based on these policies, and requires readjudication of claims which were improperly rejected under the enjoined policies.[3]

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2. The documentary materials incorporated into the record below were obtained through discovery in *Dixon v. Heckler*, 589 F. Supp. 1494 (S.D.N.Y. 1984) aff'd. 785 F. 2d 1102 (2d Cir. 1986), *petition for cert. pending*, No. 86-2. A summary of the significant documentary materials is contained in the *Dixon* Op. Cert. Brief at 3-7 and a copy of the *Dixon* Joint Appendix has been lodged with this Court.

3. In criticizing (without seeking review of) the Class Certification Order, the Secretary mischaracterizes the impact of *Bowen v. City of New York*, No. 84-1923 (U.S., June 2, 1986). For purposes of administrative exhaustion, there is no substantial distinction between the covert policies in *City of New York* and the misrepresentation of a heightened medical severity threshold. The Secretary inaccurately assured the public that a 1978 change of regulatory language was simply a "technical clarification", that did not differ in substance from the previous "slightness" standard. *See* 43 Fed. Reg. 92, 96-97 (1978). Moreover, the covert policies revealed in *City of New York* were not relied upon to waive administrative exhaustion for those claimants who still had an opportunity to exhaust administrative remedies after the litigation was commenced. Instead, collateralness was satisfied for this sub-class because:

> [T]he claims in this lawsuit are collateral to the claims for benefits that class members had presented administratively. The class members neither sought nor were awarded benefits in the District Court, but rather challenged the Secretary's failure to follow the applicable regulations. *City of New York*, slip op. at 15.

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4. The issuance of Social Security Rulings 85-28 and 86-8 and the "obsoletion" of Social Security Ruling 82-55, provide no basis for disturbing the preliminary injunction. These administrative actions were found inadequate by the District Court and Court of Appeals for continuing to interpret an unreasonably high medical severity threshold. The Third Circuit properly relied upon the history of the severity regulation, in which the public was misled as to the initiation of a heightened medical threshold test, in rejecting "such a tenuous accommodation of the Act's mandate." *See Wilson,* 796 F. 2d at 41; *Baeder,* 768 F. 2d at 552. The policies stated in the Rulings are ambiguous and do not clearly abandon the Secretary's prior practice of refusing to consider past work. Instead, they promise to consider past work only when the work was "unique".

Courts disagree as to whether this language actually embraces the rule of all twelve circuits that a claimant makes out a prima facie case by showing an inability to return to past work. Compare *MacDonald v. Secretary*

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Both cases concern a policy denying claimants their right to a full sequential evaluation pursuant to a rule initially implemented through quality assurance returns and actively hidden from public view. The Court should be especially sensitive to the findings of irreparable harm, including foregoing of medical care (33a-35a), in the face of a Government request to have claimants exhaust administrative remedies "merely to enable them to receive the procedure they should have been afforded in the first place." *See City of New York,* slip op. at 16.

The Secretary's reliance on *Heckler v. Redbud Hospital District,* 54 U.S.L.W. 3027 (U.S. July 30, 1985) is misplaced. In *Redbud,* Justice Rehnquist stayed a preliminary injunction requiring issuance of nationwide regulations. He left in place those provisions of the preliminary injunction requiring application of proper standards in determining reimbursement rates.

*of Health and Human Services,* 795 F. 2d at 1125, with *Hansen v. Heckler,* 783 F. 2d at 175. Further District Court review of the Secretary's instructional materials, quality assurance returns and other factual matters would be necessary, should this Court provide the Secretary with any discretion to interpret the severity regulation through internal rulings.

In a case in which a court is asked to permanently enjoin practices that may have been abandoned in the course of litigation, the District Court must initially evaluate any evidence that the Secretary proffers that he has abandoned his illegal past practices and is unlikely to return to them following vacatur or modification of the injunction. *See City of Mesquite v. Aladdin's Castle, Inc.,* 445 U.S. 283, 289 and n. 10 (1982). In this case, the District Court must consider the ease with which the Secretary may issue and formally "obsolete" Social Security Rulings and the Secretary's past pattern of stating one rule publicly while implementing another internally. The District Court would also consider the relevance of the Secretary's failure to employ formal rulemaking procedures, in light of his statutory obligation to follow rulemaking procedures on matters relating to disability. *See* 42 U.S.C., Section 421(k)(2).[4] These matters are properly addressed

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4. As noted in *Heckler v. Campbell,* 461 U.S. 458, 470 (1983), formal rulemaking provides an essential procedural safeguard when the Secretary seeks to dispense with individualized adjudication. The Secretary has never submitted his assumptions about the availability of jobs for persons with "non-severe" impairments to this process. He suggests that a non-expert adjudicator can simply estimate that an impairment(s) is so insignificant that it would not prevent anyone from engaging in substantial gainful activity, irrespective of age, education, and work experience.

by the District Court on appropriate motion or following a trial on the merits.

### C. The Secretary Has Made No Showing That He Would Be Prejudiced By Awaiting A Final Trial On The Merits.

Because the injunction entered below is a preliminary injunction, the Secretary remains free to present any additional facts or arguments at the final trial on the merits. In addition, the Secretary may return to the District Court to present any proposals for modification of the injunction. The Secretary has made no showing that he would be prejudiced by pursing his claims in that forum. In contrast, vacatur of the injunction would remove protections ordered by the District Court and cause harm to members of the plaintiff class.

The Secretary erroneously suggests that the injunctive relief to class members whose claims were previously adjudicated is not relevant to the disposition of his petition because this relief "has now been largely completed". (Pet. at 15) The relief ordered below "has now been largely completed" only as a result of the injunction below. If the injunction were reversed, at least some class members would lose their rights to readjudication. This result would be clearly wrong since the Secretary did not dispute below that class members whose claims were adjudicated prior to the promulgation of SSR 85-28 and the "obsoletion" of SSR 82-55 were adjudicated improperly. Indeed, the Secretary is not even seeking review of the propriety of these persons being included in the plaintiff class.

The injunction below also provides class members with crucial relief from any ongoing application of an illegal

severity standard. As respondents set forth above, the record thus far in this case, provides substantial evidence that the Secretary has applied an illegal medical threshold test. The District Court's injunction prevents hardship to class members by halting these practices and assuring that class members will not have to take each case individually to court in order to obtain proper adjudication of their claims. It does not, however, in any way alter the ultimate standards for determining disability.

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## CONCLUSION

For the above stated reasons, the petition for certiorari should be denied, irrespective of this Court's disposition of *Bowen v. Yuckert,* No. 85-1409.

Respectfully submitted,

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